#### IN THE SUPREME COURT OF MISSOURI

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#### **Supreme Court Case No. 91867**

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DEBORAH WATTS as Next Friend of NAYTHON KAYNE WATTS, Appellant/Cross Respondent,

v.

LESTER E. COX MEDICAL CENTERS d/b/a FAMILY MEDICAL CARE CENTER, LESTER E. COX MEDICAL CENTERS, MELISSA R. HERRMANN, M.D., MATTHEW P. GREEN, D.O., AND WILLIAM S. KELLY, M.D. Respondents/Cross Appellants.

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On Appeal from the Circuit Court of Greene County, Missouri
Case No. 0931-CV01172
THE HONORABLE DAN CONKLIN,
Circuit Court Judge

## AMICI CURIAE BRIEF OF WASHINGTON UNIVERSITY, SAINT LOUIS UNIVERSITY, AND UNIVERSITY OF MISSOURI IN SUPPORT OF RESPONDENTS/CROSS APPELLANTS

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# **JURISDICTIONAL STATEMENT**

Amici Curiae Saint Louis University, the University of Missouri and Washington University (collectively "University Amici") hereby adopt and incorporate herein the Jurisdictional Statement contained in the Brief filed on behalf of Respondents/Cross-Appellants Lester E. Cox Medical Centers, d/b/a Family Medical Care Center and Melissa R. Herrman, M.D., Matthew P. Green, D.O., and William S. Kelly, M.D. University Amici file their Brief pursuant to Missouri Supreme Court Rule 84.05(f)(2) because they have received consent of all parties to file a brief in this matter.

# STATEMENT OF FACTS

The University Amici adopt and incorporate herein the Statement of Facts set forth in the Brief filed on behalf of Respondents/Cross-Appellants as it relates to the constitutionality of the statutes at issue.

### INTEREST OF AMICI CURIAE

The four medical schools in Missouri and their affiliated Universities respectfully urge this Court to affirm those aspects of the Circuit Court's rulings that uphold the constitutional authority of the Missouri General Assembly to limit noneconomic damage awards in medical malpractice cases. The current \$538.210 RSMo (Supp. 2010), which the General Assembly enacted to limit just one aspect of available damages, is vitally important to the continued availability and affordability of health care in Missouri. It is fair and appropriate. Most importantly, it is well within the constitutional prerogatives of the legislature.

## Health Care Activities of the University Amici

The parties to this Amicus Brief – Saint Louis University, Washington University and the University of Missouri in Columbia and Kansas City (collectively "University Amici") – are on the forefront of the advancement of human health through clinical care, innovative research and the education of tomorrow's health care providers. Saint Louis University and Washington University are charitable corporations that were granted non-profit status because they serve important public purposes. The Universities of Missouri in Columbia and Kansas City are state entities created specifically to perform essential public functions. Collectively, the University Amici educate thousands of doctors and other health care providers each year, conduct extensive research into the causes and cures of disease, and provide health care services to millions of patients in Missouri and

across the country. They meet critical community health needs and provide essential health care services to indigent patients in Missouri.

In the City of St. Louis, for example, there are no longer any public hospitals and few remaining private hospitals. Washington University and Saint Louis University physicians staff four major emergency rooms in St. Louis, which handle over 85% of the emergency room visits. University of Missouri Hospital in Columbia is the primary trauma center outside of Kansas City and St. Louis. It provides trauma care to patients from virtually every county in Missouri, without regard to their ability to pay for those services. The physicians of Washington University and Saint Louis University provide care to thousands of trauma patients each year from all areas of Eastern Missouri. In addition, Washington University physicians and their affiliated medical resident trainees are the only remaining hospital-based obstetrical delivery service in St. Louis City.

In 2010, 25% of the population of St. Louis City and County was either uninsured or underinsured.<sup>2</sup> University Amici meet the needs of these patients in numerous ways. Saint Louis University and Washington University and their affiliated hospitals are among the founding members and current supporters of St. Louis ConnectCare, the safety net health care provider in St. Louis City that is the successor to Homer G. Phillips Hospital, Max C. Starkloff City Hospital, and St. Louis Regional Medical Center. When

<sup>&</sup>lt;sup>1</sup>This percentage is certainly climbing today, since the closing of the Forest Park Hospital emergency room in August 2011.

<sup>&</sup>lt;sup>2</sup>2011 Access to Care Data Book, St. Louis Regional Health Commission, at p. 9.

direct public support for such institutions and their activities collapsed in 1997, Washington University and Saint Louis University and others stepped in to help fill the void, as part of their overall missions of patient care and community support. In addition, Washington University and Saint Louis University's physicians, through their affiliated hospitals and clinics, provide over 90% of all specialty care visits to uninsured or underinsured St. Louis City and County residents annually. These visits numbered more than 200,000 in 2010, and this figure does not take into account the numerous specialty visits provided to Missouri residents who live outside the St. Louis Metropolitan area and travel to see the Universities' specialty physicians. Close to 20% of all specialty care provided to St. Louis City and County residents is charitable care provided by Washington University, Saint Louis University and their affiliated hospitals.<sup>4</sup> Washington University and its physicians also perform their mission of patient care for low-income individuals and community outreach through their close affiliations with four federally-qualified health care centers.

To meet the health care needs of those in St. Louis who are unable to afford primary and preventative care, Saint Louis University medical students, under the supervision of volunteer School of Medicine faculty, operate Health Resource Center.

This is a clinic in an underserved area of St. Louis providing treatment to patients with no medical safety net. Saint Louis University and Washington University faculty and

<sup>&</sup>lt;sup>3</sup>2011 Access to Care Data Book, St. Louis Regional Health Commission at pp. 20-22.

 $<sup>^{4}</sup>Id.$ 

students volunteer at Casa de Salud, a health clinic offering medical care to Hispanic Americans. Saint Louis University medical students teach an anatomy class at the Innovative Concept Academy, a St. Louis school providing educational and other needs for troubled students. Washington University medical students also assist in providing health care services and education to the St. Louis Community in a variety of ways, including the operation of free weekly medical clinics for underserved patients, providing health information to students in St. Louis public schools, and offering community-based health screenings.

The University Amici strive to the best of their abilities to continue efforts related to patient care for all through affirmative outreach services, while also serving their other key missions of education and research. The University Amici's education and research missions are far from self-supporting and their clinical care revenues are simply not sufficient over the long term to support such community-oriented patient care and outreach if those same revenues must also provide for unlimited medical malpractice claims payments and reserves.

# The University Amici's Self-Insurance Programs

The University Amici self-insure the vast majority of their annual medical malpractice payouts and liability exposure. Each year they must set aside sufficient funds to pay settlements, judgments, defense and administration costs of current claims. They also reserve funds for the ultimate resolution of future claims and suits that may arise out of incidents in the current year. When the University Amici establish such reserves,

those funds are segregated from the general operating funds of these institutions—often for up to ten years or more—and cannot be used for any other aspects of the medical schools' missions, such as community outreach and patient care.

Above their self-insurance retention, the University Amici purchase some "excess" insurance coverage on the open commercial markets to protect against portions of potential catastrophic claims. For example, a self-insured institution might cover the first \$2 million in exposure for each claim through internal reserves, then buy commercial excess insurance for the next \$10 million or more per claim.

Actuarial methods of calculating internal reserves and pricing commercial insurance are complex. In general, two important factors in the analyses are the predictability of the institution's future claims experience and the likely or maximum amount of recoverable damages per claim. Uncertainty about the potential exposure on medical malpractice claims and wide variances in the amounts of damage awards (with significantly higher average awards) would require Universities to increase their self-insured reserves and pay more for excess insurance.

The damages recoverable by a plaintiff in cases against health care providers include noneconomic damages and economic damages. The latter may include medical expense in the past and future, and economic loss based on lost earnings and/or loss of earning capacity. *See* § 538.215 RSMo (2000); §538.205(7) RSMo (Supp. 2010), *Wyatt v. U.S.*, 939 F. Supp. 1402, 1412-1413 (E.D. Mo. 1996). Economic losses asserted by claimants encompass a wide range of categories and services and have included not only

medical care and prescriptions, but also medical equipment, (*i.e.*, wheelchairs or hospital beds), therapy modalities, (*i.e.*, physical, occupational and occupational therapy), assistive technology (*i.e.*, ipad, adaptive keyboard), home modification (*i.e.*, ramps, wheelchair lifts), the cost of providing care (*i.e.*, attendant care, day program or respite care), as well as recreational therapies (*i.e.*, summer camp, music therapy).

Economic damages are ascertainable from documentary evidence or through the testimony of experts. Noneconomic damages, on the other hand, are not amenable to reliable forecast. Jurors are given no objective guidance in assessing the dollar amounts to award plaintiffs for noneconomic damages, which arise from non-pecuniary harm, such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement and loss of capacity to enjoy life. *See* § 538.205(7) (Supp. 2010); *Wyatt*, 939 F. Supp. at 1412-1413.

In the experience of the University Amici, the uncertainty and high variability associated with unlimited noneconomic damage awards dramatically increase the costs to provide for potential medical malpractice liability. The unpredictable nature of noneconomic damages before 2005 required the University Amici to set higher reserves, thereby locking up large amounts of funds for years until final resolution of all claims for a given year. As claims were resolved, higher noneconomic damage awards affected claims experience resulting in increased premium costs.

## Evolution of Limitations on Noneconomic Damage Awards in Missouri

In 1986, concerns about a malpractice insurance crisis in Missouri prompted the General Assembly to place a limit on the amount of noneconomic damages that could be recovered from a medical malpractice defendant. Section 538.210 then provided that a plaintiff in a malpractice action could recover no more than "three hundred fifty-thousand dollars per occurrence for noneconomic damages from any one defendant . . . ." § 538.210 RSMo (1986).

In the experience of the University Amici, the General Assembly's compromise of codifying the availability of these damages but limiting the amount of such awards initially had a substantial salutary impact on the costs associated with medical malpractice liability. However, in the early 2000's those costs again began to increase substantially, due in large part to a series of lower court decisions that had the effect of eroding the General Assembly's 1986 limitation on noneconomic damages.

In *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. E.D. 2002) and *Cook v. Newman*, 142 S.W.3d 880 (Mo. App. W.D. 2004), the Eastern and Western District Courts of Appeals interpreted the phrase "per occurrence" to mean that a separate cap could be applied to each act of medical negligence that caused or contributed to a plaintiff's injury. As a result, malpractice plaintiffs could avoid the effect of the cap by artful pleading – parsing the physician-patient relationship into multiple "occurrences" of negligence. The effect of *Scott* and *Cook* was to vitiate the 1986 limit on non-economic damages and to seriously undermine a health care provider's ability to reasonably or

reliably predict its exposure. The claims experience of University Amici reflects the effect of these decisions.

Figure 1 in the Appendix to this brief reflects the relative claims experience of the University Amici from 1998 through 2010, limited to the first \$1 million in exposure for each claim and scaled to 1998.<sup>5</sup> The yellow portion of the vertical bars reflect the total amount of money paid from the self-insured programs of the University Amici in legal costs and indemnity payments on the claims and suits first made in that six-month period. The orange portion of the vertical bars represent the amount of funds set aside as reserves for payments on currently pending claims first reported in each six-month period.

Figure 1 illustrates the substantial increases in payments on claims made during the period of 2001 through 2005. The upward trend began with 2001, because the vast majority of the indemnity payments on claims reported in 2001 were made after the *Scott* decision in January, 2002. Figure 1 also shows that the 2005 amendments have been effective in reducing the costs associated with these claims, although these costs have only in the past two years returned to the level of 1998.<sup>6</sup>

<sup>&</sup>lt;sup>5</sup>Affidavits explaining the data provided by each University Amicus in support of Figure 1 are also included in the Appendix to the brief.

For the periods 1H1998 through 2H2000 (the period generally encompassing claims resolved before the impact of the *Scott* decision), the average yearly claim experience, normalized to 1998, was approximately 1.2. After *Scott* and before tort reform (the period including 1H2001 through 1H2005), the average claim experience was

Although the 1986 statutory limitation was undermined by *Scott*, it still restrained to some extent the claims experience from 2001 to 2005. Undoubtedly, claims expenses will be substantially higher with no limitation at all. The University Amici will then be compelled to shift resources away from benevolent patient care and community services to fund higher reserves and claim payments. Since 2005, indemnity payments have dropped closer to the limits experienced before *Scott*, allowing the availability of more University funds for health care services, research and medical education.

The University Amici also purchase excess insurance which covers indemnity costs that exceed the self-insurance. These costs are not depicted in Figure 1. Prior to the effective date of House Bill 393, the Universities experienced a substantial increase in the cost of excess insurance. Since the 2005 amendments to § 538.210, premium costs have declined.

# The Legislative Process

The 2005 tort reform amendments at issue in this case are clearly a legislative response to the erosion of the 1986 limitation on noneconomic damages. Reasonable minds may differ on whether these amendments strike the optimal balance between protecting those injured by medical negligence and promoting the availability of health care for all Missourians. Legislation is seldom that precise or prescient. However, the legislative process also has an iterative quality that over time allows adjustments to be

significantly higher – approximately 2.2. After tort reform (the period of 1H2006 through 2H2010), the average claim experience declined to approximately 1.6.

made with the benefit of experience and an evolving political consensus. "[R]eform may take one step at a time." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (Douglas, J.). The General Assembly and the Governor took one such step in 1986, which was upheld by this Court, and then they took another such step in 2005, largely at the invitation of the lower courts. The University Amici believe that the flexibility inherent in the legislative process is critical to the future of health care in Missouri as we compete with other states for the medical personnel and facilities essential to maintaining, let alone improving, the level of health care currently available to Missouri citizens.

It is therefore critical to the University Amici that the General Assembly retain its constitutional authority to adjust the balance between those injured by medical malpractice and the availability of health care in this State. To that end, the University Amici address the constitutional arguments that most directly challenge the General Assembly's authority in this regard. The University Amici respectfully submit that those challenges should be rejected and the General Assembly's authority reaffirmed.

### POINTS RELIED ON

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT
SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS
CONSTITUTIONAL BECAUSE THIS STATUTE DOES NOT
VIOLATE THE RIGHT TO TRIAL BY JURY GUARANTEED BY
THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 22(a), IN
THAT THE AMENDMENTS TO §538.210 ARE WITHIN THE
POWER OF THE LEGISLATURE TO DECLARE THE
SUBSTANTIVE LAW AND IT IS FOR THE COURT TO APPLY
THE LAW AFTER THE JURY HAS COMPLETED ITS
CONSTITUTIONAL FUNCTION

Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992)

Carroll v. Missouri Pacific Railway Co., 88 Mo. 239, 1885 WL 7405 (Mo. 1885)

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

Harrell v. Total Health Care, Inc., 781 S.W.2d 58 (Mo. banc 1989)

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT
SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS
CONSTITUTIONAL BECAUSE THIS PROVISION DOES NOT
VIOLATE THE SEPARATION OF POWERS PROVISION OF THE
MISSOURI CONSTITUTION, ARTICLE II, SECTION 1, IN THAT
IT DOES NOT IMPROPERLY ENCROACH UPON THE POWERS
OF THE JUDICIARY.

Fust v. Attorney General for the State of Missouri, 947 S.W.2d 424 (Mo. banc 1997) DeMay v. Liberty Foundry Co., 37 S.W.2d 640 (Mo. 1937)

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT
SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS
CONSTITUTIONAL BECAUSE THIS STATUTE DOES NOT
VIOLATE THE EQUAL PROTECTION CLAUSE OF THE
MISSOURI CONSTITUTION, ARTICLE I, SECTION 2, IN THAT
THE AMENDMENTS TO §538.210 ARE RATIONALLY RELATED
TO THE STATE'S LEGITIMATE INTEREST IN PRESERVING
ADEQUATE, AFFORDABLE HEALTH CARE FOR ALL
MISSOURIANS

Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992)

Harrell v. Total Health Care, Inc., 781 S.W.2d 58 (Mo. banc 1989)

Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. banc 1991)

Batek v. Curators of University of Missouri, 920 S.W.2d 895 (Mo. banc 1996)

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT §538.210,
AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL
BECAUSE THIS PROVISION DOES NOT VIOLATE ARTICLE III,
SECTION 40 OF THE MISSOURI CONSTITUTION IN THAT IT IS
NOT A SPECIAL LAW AND IT DOES NOT CREATE AN
ARBITRARY CLASSIFICATION

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. banc 1991)

Ross v. Kansas City General Hospital and Medical Center,

608 S.W.2d 397 (Mo. banc 1980)

Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. banc 1968)

Batek v. Curators of University of Missouri, 920 S.W.2d 895 (Mo. banc 1996)

### **ARGUMENT**

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS STATUTE DOES NOT VIOLATE THE RIGHT TO TRIAL BY JURY GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 22(a), IN THAT THE AMENDMENTS TO §538.210 ARE WITHIN THE POWER OF THE LEGISLATURE TO DECLARE THE SUBSTANTIVE LAW AND IT IS FOR THE COURT TO APPLY THE LAW AFTER THE JURY HAS COMPLETED ITS CONSTITUTIONAL FUNCTION

In 2005, the Missouri General Assembly enacted House Bill 393, which repealed and amended several different sections of the Missouri Revised Statutes relating to claims for damages. Section 538.210, as amended by House Bill 393, provides:

In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars for noneconomic damages irrespective of the number of defendants.

§538.210.1 RSMo (Supp. 2010).

The \$350,000 limitation set forth in \$538.210 is applicable only to an award of noneconomic damages. In any action against a health care provider, damages must be itemized by the trier of fact to include: past economic damages; past noneconomic

damages; future medical damages; future economic damages and future noneconomic damages. §538.215 RSMo (2000). A medical malpractice plaintiff is entitled to recover – without limitation – all economic and medical damages. Economic damages arise from pecuniary harm and include medical damages, lost wages and lost earning capacity. §538.205(1) RSMo (Supp. 2008). "Medical damages" arise from "reasonable expenses for necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial and other health and rehabilitative services." §538.205(6) RSMo (Supp. 2010). Claimed economic damages include not only direct health care expenses but a broad array of pecuniary losses that are not specifically mentioned in the statute but that fall within the general category of "health and rehabilitative services." These claims have included such diverse items as the cost of modifying a home, purchasing a van with a wheelchair lift, participating in various therapies or even the expense of general household services. The General Assembly has limited only noneconomic damages – which include, among other things, pain, suffering, mental anguish, and inconvenience.

Appellant/Cross-Respondent Deborah Watts, as Next Friend for Naython Kayne Watts ("Watts"), contends that the limitation on noneconomic damages in §538.210 unconstitutionally violates the right to trial by jury guaranteed by Article I, Section 22(a) of the Missouri Constitution. However, "[a] statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution." *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 903 (Mo. banc 1992). Challengers such as Watts must prove "abuse of legislative discretion beyond a

reasonable doubt." *Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324, 327 (Mo. banc 1982). In other words, if a reasonable doubt exists as to a statute's constitutionality, the doubt must be resolved in favor of its validity. *Id. See also Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991).

#### A.

## Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992)

There should be no doubt about the constitutional validity of §538.210, as amended by House Bill 393. This Court upheld the original version of this statute, first enacted in 1986, in the face of the same constitutional challenge in *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992). The 1986 statute imposed a limit on noneconomic damages of \$350,000 per occurrence as to each defendant with adjustments for inflation.

Under the principle of *stare decisis*, this Court should decline to revisit the validity of limitations on noneconomic damages. Since the legislature's changes in 2005 affect only the amount of the limitation, rather than the principle underlying its imposition, there is no reason to depart from the Court's decision in *Adams. E.g.*, *Eighty Hundred Clayton Corp. v. Director of Revenue*, 111 S.W.3d 409, 410 (Mo. banc 2003) (Court bound by earlier interpretation of statute where legislature amended only the rate of applicable tax rather than governing language); *Hodges v. City of St. Louis*, 217 S.W.3d

278, 281-82 (Mo. banc 2007) (declining to revisit constitutionality of limitation on damages payable by a public entity on grounds of *stare decisis*).

In *Adams*, as here, the appellants argued that the limitation on noneconomic damages denied them their constitutional right to a jury trial. The appellants in *Adams* claimed that the right of jury trial includes the right to have the jury determine all damages without interference by the legislature. *Adams*, 832 S.W.2d at 907.

The right to a jury trial originated in the Missouri Constitution of 1820 which stated "that the right of trial by jury shall remain inviolate." Article XIII, sec. 8. In 1875, the phrase "as heretofore enjoyed" was added to the jury trial provision contained in the Bill of Rights. Art. I, Section 22(a) of the Missouri Constitution of 1945 currently states that "the right of trial by jury as heretofore enjoyed shall remain inviolate. . . ."

The *Adams* Court concluded that the damages limitation set forth in §538.210 did not violate the jury trial guarantee contained in the Missouri Constitution. The Court's conclusion rested on three key premises that are derived from jurisprudence dating back to the early 1800's, before Missouri became a state and before the adoption of the Constitution of 1820.

The first is a recognition of the nature of the right protected. The essential nature of a jury trial at common law – the procedure to be preserved "as heretofore enjoyed" – is a determination by 12 impartial jurors. In *Adams*, the Court recognized that a jury's primary function is fact-finding. In that case, the jury assessed liability and damages and therefore completed its constitutional task. *Id.* at 907. Second, the *Adams* Court

recognized that the trial court's role is to apply the law to the facts. Historically, a court's application of substantive principles of law following the return of a jury verdict has not been found to violate the constitutional guarantee of a trial by jury. Finally, the Court correctly noted that "the legislature has the right to abrogate a cause of action cognizable under common law completely." *Id.* at 907. "If the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery in those causes of action." *Id.* 

#### В.

# The Adams Court Correctly Recognized that the Constitutional Guarantee of a Trial by Jury as "heretofore enjoyed" refers to the Essential Requisites of a Jury Trial at Common Law

Watts, relying on a concurrence in *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010), confuses the constitutional guarantee that preserves the essential elements of a jury system with the substantive law outlining the issues to be decided by a jury. This Court has long recognized that the phrase "as heretofore enjoyed" refers not to the substantive cause of action being tried but rather to the essential features of the jury system.

By "the right of trial by jury as heretofore enjoyed" in our organic law is meant that the people of this commonwealth shall not be denied the essential features of the jury system as understood and practiced at the common law, chief among which have been esteemed the right to have a jury composed of 12 men, that they should be unanimous in their

verdict, that they should be impartial, and that case[s] triable by a jury at common law should continue to be so tried in this state.

State ex rel. Kansas City & S. RY. Co. v. Slover, 36 S.W. 50, 51 (Mo. 1896).

The Constitutional right to a trial by jury "as heretofore enjoyed" is a protection of these fundamental elements of trial by jury. This Court has struck down provisions that attempted to alter these essential features. For example, in *Vaughn v. Scade*, 30 Mo. 600 (Mo. 1860), the trial court refused to empanel a jury of more than six people. This Court reversed, holding that "if there are any essential requisites in a jury trial, among them must be the number of jurors and unanimity in their verdict." *Id.* at 603. The *Vaughn* Court went on to state that the "term 'trial by jury' was well known and understood at the common law" to require both twelve men and unanimity, and "in that sense it was adopted in our bill of rights." *Id.* at 604.

Following the decision in *Vaughn*, "[m]any able, learned, and patriotic men [came] to regard the rule requiring unanimity in the verdict in civil cases as absurd and out of harmony with all the other principles of our government." *Gabbert v. Chicago*, *R.I. & P. RY. Co.*, 70 S.W. 891, 897 (Mo. 1902). In light of the Court's prior holdings regarding the essential elements of a trial by jury, a constitutional amendment was required to alter the unanimity requirement in civil cases. Consequently, in 1900, an amendment to the Constitution was proposed and adopted so that "in all civil cases three-fourths of the jury concurring may render a verdict." *King City v. Duncan*, 142 S.W. 246 (Mo. 1911).

While the essential features of the jury system are preserved by the Missouri Constitution, "[t]he procedural amenities of the common law relating to management of the jury during the course of a trial are not essential elements of the common law right to jury trial." State v. Hadley, 815 S.W.2d 422, 425 (Mo. banc 1991). For example, in State v. Hadley, this Court upheld as constitutional a statute that permitted the jury to adjourn during deliberations. The defendant argued that under the common law in felony cases it was reversible error to permit jurors to "go at large" after being sworn while court was not in session. This Court acknowledged the common law practice but concluded that the statute did not impinge on the constitutional right of trial by jury. "Unless there is a showing that a statute on its face or as applied impinges on one or more of the recognized elements of the common law right to a trial by jury, statutory procedures regarding jury management are valid." Id. at 425-26. See also Slover, 36 S.W. at 52 ("[I]t is the historical jury of 12 that is guarantied (sic) by the constitution and bill of rights, and we have seen that when the essentials are preserved, all other matters looking to their selection are confided to the legislature.").

The historical jury of 12 impartial jurors as "heretofore enjoyed" is the right that is guaranteed by the Missouri Constitution. As the *Adams* court correctly concluded, this right is fulfilled by the jury's determination of liability and damages. Once those functions are performed, "the jury [has] completed its constitutional task." *Adams*, 832 S.W.2d at 907.

C.

# Missouri Statutes Dating back to 1808 have Required the Courts to Apply Substantive Principles of Law to a Jury Determination Before Entering Judgment

In Adams, this Court recognized that the trial court's role is to apply the law to the facts. Section 538.210 – then and now – established the substantive, legal limits of the plaintiffs' damage remedy. "In this sense, the permissible remedy is a matter of law, not fact, and not within the purview of the jury." Adams, 832 S.W.2d at 907. The *Adams* court went on to state that because the limitation is not applied until after the jury has completed its constitutional task, it does not infringe upon the right to a jury trial. Watts argues that Adams was wrongly decided because the Adams court failed to appreciate that historically juries set the amount of damages awarded to plaintiffs in civil actions for damages. While it is true that juries have historically determined the amount of a plaintiff's damages as a factual matter, that determination has always been subject to adjustment by the court to conform with the law. As early as 1808, the General Assembly of the Territory of Missouri began enacting statutes that required legislatively-mandated adjustments to a jury's damage determination – well before adoption of the Missouri Constitution of 1820. Cases interpreting these statutes reflect a longstanding view by the Missouri courts that such statutes are within the power of the legislature.

For example, in *Withington v. Hilderbrand*, 1 Mo. 280, 1823 WL 1581 (Mo. 1823), the plaintiff sought to recover under a statute enacted on October 7, 1808 which provided double damages for the death of any horse resulting from an improper enclosure. This Court, in upholding the verdict, stated that the "single damages were only to be ascertained by the jury, and these damages were, according to the statute, to be doubled, not by the jury but by the court, as was done in this case." *Id.* at \*1.

In 1817, the General Assembly of the Territory of Missouri enacted a statute for the "prevention of certain trespasses." That statute provided in pertinent part that "[i]f any person shall cut down, injure or destroy, or carry away, any tree or trees whatever . . . in which he hath no interest or right . . . [such person] shall forfeit and pay the party injured, treble the amount of the thing so damaged, broken, destroyed or carried away, together with costs of suit . . . ." *See* Laws, Territory of Missouri, Ch. 202 (enacted January 30, 1817). In *Walther v. Warner*, 26 Mo. 143 (Mo. 1858), an opinion addressing a later-enacted version of this same statute, this Court stated "the practice in this state has been for the jury to assess the actual value of the property taken or injured, and for the court to treble the damages." *Id.* at 148.

On December 12, 1855, the General Assembly passed "an act for the better security of life, property and character" known as the "Damage Act." This statute was the first attempt by the Missouri legislature to enact a "wrongful death" statute. Under Section 2 of the Damage Act, the family members of any person who died as a result of

injuries caused by the negligence of employees of a railroad or other specified industry had a right to bring an action to recover the "sum of five thousand dollars."<sup>7</sup>

Sections 3 and 4 of the Damage Act – which described a cause of action that was not limited to railroad employees or other industries – authorized an award of damages "not exceeding five thousand dollars" when any person negligently caused the death of another. R.S. 1855, ch. 51, p.647. In an action under these sections, a jury would be instructed to determine the amount of damages, not exceeding \$5,000 "as [the jury] may deem fair and just, with reference to the necessary injury resulting to plaintiffs from the death. . . . . and also having regard to the mitigating and aggravating circumstances attending the neglect complained of." *Nagel v. Missouri Pacific Railway Co.*, 75 Mo. 653 (Mo. 1882).

In both causes of action, the damages were awarded for the pecuniary loss in the death of the person killed. Although the statute fixed the amount of damages in one section, and left it to be fixed by the jury in the other, subject to the \$5,000 limitation, "there is no difference in the principle involved." *Behen v. St. Louis Transit Co.*, 85 S.W. 346, 351 (Mo. 1904), *overruled on other grounds*, 66 S.W.2d 920 (Mo. 1933). "In both cases the damages are given as compensation to the plaintiff for his pecuniary loss in the death of the person killed . . . ." *Id*.

<sup>&</sup>lt;sup>7</sup>The provision for a fixed damage payment of \$5,000 was described by the Court as "compensatory damages liquidated by the statute." *Coover v. Moore & Walker*, 31 Mo. 574 (Mo. 1862).

There do not appear to have been any constitutional challenges to the \$5,000 limitation on damages provided for in an action arising under Sections 3 and 4 of the Damage Act. In 1885, 30 years after the original enactment of the Damage Act, there was a constitutional challenge to the \$5,000 fixed payment provision contained in Section 2 of the Act. In Carroll v. Missouri Pacific Railway Company, 88 Mo. 239, 1885 WL 7405 (Mo. 1885), a widow brought an action for the death of her husband as a result of the negligence of the defendant railway in the management of its trains. The defendant challenged the constitutionality of the Damage Act because the amount of recovery was fixed at five thousand dollars. Id. at \*2. The defendant argued that the damage provision deprived it of its property without due process of law. The defendant also asserted that it was deprived of its right to a jury trial because the statute arbitrarily liquidated and measured the quantum of damages. *Id.* at \*4. This Court disagreed stating that "the same argument and constitutional objections that the damages are arbitrarily fixed by the statute, would invalidate a very large number of other sections in our statutes . . ." Id.<sup>8</sup>

<sup>&</sup>lt;sup>8</sup>A legislatively fixed amount of damages does more to alter a jury's verdict than a statutory limitation on damages. Yet, in *Rafferty v. Missouri Pacific Railroad Company*, 15 Mo.App. 559 (Mo.App. St. Louis 1884), the St. Louis Court of Appeals reversed a jury verdict for \$2,500 that was in derogation of the statutory provision of the Damage Act that specified fixed damages of \$5,000. In granting a new trial, the court of appeals stated that "[i]n undertaking to fix the damages in such a case, the jury exceed[ed] their jurisdiction, and are guilty of a violation of law not less gross than if they attempted in a criminal case to assess a punishment greater or less than that limited by statute." *Id.* at

These cases demonstrate that there has been a historical practice dating back to 1808 of permitting damage issues to be submitted to the jury subject to the court's application of laws reflecting the policy judgments of the General Assembly. Whether the limitation is derived from a statutory cause of action (as it does in Carroll), or a common law cause of action is irrelevant with respect to the scope of the right to a jury trial. The constitutional right of trial by jury has long been held to apply to both common law and statutory causes of action. See Briggs v. St. Louis & S.F. Ry. Co., 20 S.W. 32, 33 (Mo. 1892) ("constitutional right is implied in all cases in which an issue of fact, in an action for the recovery of money only, is involved, whether the right or liability is one at common law or is one created by statute"). In 2003, this Court reaffirmed the holding of Briggs in State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003), recognizing that "[t]he right to trial by jury exists in actions at law but not in actions in equity" and that actions at law arise both under the common law and by statute. *Id.* at 85. Thus, there is no logical basis for drawing any distinction between common law and statutory causes

<sup>\*2.</sup> The *Rafferty* opinion again demonstrates that in 1884, not long after adoption of the "heretofore enjoyed" language of the 1875 Constitution, there was no perceived constitutional bar to the longstanding practice of applying legislative limitations to override determinations of a jury.

of action or the General Assembly's ability to limit the remedies pertaining to such causes of action.<sup>9</sup>

Nor is there any basis for comparing the practice of remittitur to the limitation on damages enacted by the General Assembly in §538.210. The remittitur statute permits a court to determine the reasonableness of a jury's verdict in a specific case based on the evidence before it. That practice is not the issue before this Court. Rather, this Court must address whether it is within the power of the General Assembly to make a legislative judgment regarding the quantum of damages for pain and suffering recoverable in *every* action against a health care provider. As is discussed in Section I.D. below, the *Adams* Court correctly concluded that the General Assembly has the power to limit recovery in common law causes of action and that such a limitation does not infringe on the right to a jury trial.

<sup>&</sup>lt;sup>9</sup>In his *Klotz* concurrence, Judge Wolff suggests that there is some distinction between the scope of the jury trial right in a statutory action versus one arising under common law. However, this argument in *Klotz* seems to directly contradict the Court's opinion in *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 88 (Mo. banc 2003), also authored by Judge Wolff, in which the Court quotes *Briggs* with approval and specifically identifies the wrongful death statute as an example of a type of claim that has "traditionally . . . carried the right to a jury trial."

# The Adams Court Correctly Recognized the Power of the General Assembly to Determine the Substantive Law, Including the Imposition of Limits on Recovery in Common Law Causes of Action

This Court recognized in *Adams* that the legislature has the right to abrogate a cause of action cognizable under the common law. It reasoned that if the legislature has the constitutional power to create and abolish causes of action, "the legislature also has the power to limit recovery in those causes of action." Adams, 832 S.W.2d at 907. The Adams Court's reasoning is again consistent with longstanding Missouri jurisprudence recognizing that it is the legislature's role to determine and adjust the nature of the remedy. Indeed, in 1884, in upholding the constitutionality of a provision allowing double damages for the killing of a mule, this Court wisely stated that "[t]he errors and oppressions of a legislative body are more readily corrected. The people [have] more potential through the ballot box to reach immediately the evil. The legislature lives for only two years. The process of rectifying the mischief of a misconstruction by the judiciary of the fundamental law is necessarily slow." Humes v. Missouri Pacific Railway Co., 82 Mo. 221, 1884 WL 394, \*4 (Mo. 1884), aff'd, 115 U.S. 512 (1885). "Therefore, and wisely, the courts before pronouncing a statute void, demand to be satisfied beyond a reasonable doubt of its vice." Id. at \*5.

In 1910, this Court reaffirmed these statements from *Humes* when it upheld an amendment to the Damage Act that eliminated the provision for a fixed payment of

\$5,000 and instead provided for an award of "not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury, which may be sued for." *Young v. St. Louis, I. M. & S. Ry. Co.*, 127 S.W. 19, 20 (Mo. 1910) *(quoting Sess. Acts 1905, p. 135)*. This section was construed to impose both a penalty and compensation. <sup>10</sup>

In *Young*, the appellant argued that the enactment of this new damages provision specifying a range of \$2,000 to \$10,000 violated his right to due process by improperly delegating a legislative function to the jury. This Court disagreed stating that the legislature may lawfully vest in the trier of fact a power to determine the remedy within certain limits. *Id.* at 21. "It has been, from time immemorial in England, from whom we inherited the common law, and in this country, for the legislative department of the government to prescribe the punishment or penalty within limits, except in certain cases, and leave it to the courts to fix the extent in each case." *Id.* 

Nowhere in *Young* is there any suggestion by the parties or the Court that a statutory provision fixing the damages within a specified range could somehow infringe upon the constitutional right of trial by jury. Instead, there is a discussion of the legislature's power to prescribe a fixed amount in every case, as was done in the Damage

<sup>&</sup>lt;sup>10</sup>See Johnson v. Dixie Mining & Development Co., 156 S.W. 33, 33-34 (Mo. App. Springfield 1913) ("the defendant is required to pay as a penalty at least \$2,000, and, in the discretion of the jury, any greater sum according to the aggravating circumstances; and under this section the plaintiff will be permitted to allege, prove, and recover any necessary pecuniary damage occasioned by the wrongful act of the defendant to the extent of the amount named in the statute").

Act prior to its amendment in 1905. There is also a recognition by the court that experience may have taught the lawmakers that a different legislative approach was necessary. *Young*, 127 S.W. at 21 ("experience seems to have taught the lawmakers that different circumstances covered different cases"). Thus, even as early as 1884 and 1910, when *Humes* and *Young* were decided, this Court acknowledged the iterative quality of the legislative process and the need to afford the legislature the discretion to make adjustments to the appropriate measure of damages based on accumulated experience.

As recently as 1989, the Court reaffirmed the legislature's power to limit the scope of a medical negligence case by legislatively determining which persons and corporations should be held accountable for the consequences of medical malpractice. In *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. banc 1989), this Court upheld a legislative determination that exempted health services corporations from liability for medical malpractice on the part of the medical providers with whom these corporations contracted for services. In so holding, the Court recognized, again, that determinations regarding which persons will be held liable for medical malpractice are "not etched in stone and beyond the power of the legislature to change." *Id.* at 62. These principles were reiterated by this Court in *Adams*, which expressly acknowledged the power of the legislature to adjust the recovery available in medical malpractice actions. They are also derived from the fundamental organic principle vesting in the legislature the power to declare what the law shall be. *Drehman v. Stifel*, 41 Mo. 184, 1867 WL 72, \*12 (Mo.

1867), *aff'd*, 75 U.S. 595 (1869) (judiciary has only the power to declare the law as "we find it"; to declare what the law shall be is legislative).

What Watts seems to suggest is that the preservation of the right to a trial by jury has somehow frozen the scope of the substantive law as it existed in 1820. This proposition is inconsistent with Missouri law. The fixing of a legal remedy based on general policy considerations is an essential legislative function. See, e.g., Humes, 1884 WL 394, \*4-\*5; Young, 127 S.W. at 21. In the late 1800's and early 1900's, the General Assembly was focused on the "peculiar hazardous nature of the business of railroading" and the appropriate remedy for injuries resulting from those hazards. At that time, this Court gave deference to the legislative judgments of the General Assembly regarding the appropriate recovery when an employee of a railroad or similar industry negligently caused injury or death. This Court should give that same deference to the General Assembly's legislative judgments regarding health care in Missouri. See, e.g., Drehman v. Stifel, 41 Mo. 184, \*12 (Mo. 1867) ("If [an] ordinance be deemed an unwise abridgment of the rights and liberties of the citizen, or whenever it shall be thought to operate oppressively or unjustly, the remedy lies with the people in the power of amendment.").

This Court concluded in *Adams* that the 1986 version of §538.210 was enacted to confront a medical malpractice insurance crisis that "threatened adversely to affect primary health care in Missouri" and that the statute represented an effort by the legislature to reduce rising medical malpractice premiums and to discourage physicians

from leaving specialties that carried a higher risk of a malpractice claim. *Id.* at 904. This Court commented that the existence of the crisis was "debatable," and that both sides had presented an "array of evidence" supporting and refuting the existence of a "crisis" in medical malpractice premiums. *Id.* However, the Court acknowledged its obligation to resolve all doubt in favor of the General Assembly. "While some clearly disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists." *Id.* 

It is evident from the laws prior to adoption of the Constitution of 1820 and caselaw dating from the early 1800's that the guarantee of a trial by jury has never been viewed as a basis for constraining the legislature's judgment regarding the appropriate measure of recovery in a common law or statutory cause of action for personal injury. The University Amici respectfully submit that this Court should find that §538.210 RSMo does not infringe the constitutional right to a trial by jury.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS PROVISION DOES NOT VIOLATE THE SEPARATION OF POWERS PROVISION OF THE MISSOURI CONSTITUTION, ARTICLE II, SECTION 1, IN THAT IT DOES NOT IMPROPERLY ENCROACH UPON THE POWERS OF THE JUDICIARY.

Watts contends that § 538.210 violates Article II, Section 1 of the Missouri Constitution, the separation of powers provision, because the cap on noneconomic damages "invades the traditional judicial function of assessing, on a case by case basis, whether a jury's damages award is excessive or inadequate and against the weight of the evidence and supersedes that judicial power, which is conditioned on a new jury trial, with a fixed 'legislative remittitur'. . . ." *See* Appellant's Initial Brief at 34. This argument is unpersuasive.

The Missouri courts have consistently upheld the power of the legislature to limit, as well as completely abrogate, common law causes of action. *See Fust v. Attorney General*, 947 S.W.2d 424, 431 (Mo. banc 1997); *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6 (Mo. banc 1992); *Mahoney v. Doerhoff Surg. Serv., Inc.*, 807 S.W.2d 503 (Mo. banc 1991). As early as 1931, in *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931), the Court acknowledged that a "citizen has no property [right] in a rule of law . . ." and that the legislature "may regulate or entirely abolish the common-law rules of liability . . . ." *Id.* at 647. Under this longstanding doctrine, the Missouri General

Assembly unquestionably has the plenary power to enact legislation that limits the recovery of a tort litigant.

It is also well settled that such a limitation on recovery does not violate the constitutional separation of powers provision of the Missouri Constitution. In *Fust v*. *Attorney General for the State of Missouri*, 947 S.W.2d 424 (Mo. banc 1997), this Court considered the constitutionality of §537.675, which provides that 50% of any punitive damages award is deemed to be rendered in favor of the State. This Court concluded that there was no separation of powers violation because the statute did not interfere with the judicial function. "Rather, the statute is a limitation on a common law cause of action for punitive damages. Placing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function." *Id.* at 430-31 *citing Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988). <sup>11</sup>

overruled. In 1988, in *Simpson*, the Court upheld a dram shop provision that precluded a plaintiff from pursuing a civil cause of action unless the putative defendant had been convicted of violating certain liquor laws. In *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), the Court overruled *Simpson*, concluding that it would violate the separation of powers clause to permit a prosecuting attorney – rather than the legislative branch – to determine, through his prosecutorial discretion, whether an injured party could pursue a civil cause of action. *Id.* at 552. Nowhere in *Kilmer* did this Court address the plenary power of the General Assembly to limit a damage award or whether such a limitation would run afoul of the separation of powers doctrine.

Like the punitive damages provision at issue in *Fust*, the General Assembly's noneconomic damages limitation in § 538.210 does not interfere with any judicial function. Certainly the judiciary decides the facts in a civil case and may determine the amount of damages, but that function does not prohibit the legislature from limiting the recovery as a matter of law. E.g., Drehman, 1867 WL 72 at \*12 (remedy lies with the people to amend allegedly unwise ordinance limiting right of recovery for forcible entry and detainer; judiciary only has power to "declare the law as we find it"); Arbino v. Johnson & Johnson, 880 N.E.2d 420, 437-38 (Ohio 2007). In fact, numerous statutes in Missouri direct the courts to award double or treble jury damages in certain causes of action. See, e.g., §537.330 RSMo (2000) (person who maliciously damages item shall pay double the value of item); §537.340 RSMo (Supp. 2010) (treble damages to be awarded for destruction of trees); §537.420 RSMo (2000) (life tenant who commits waste liable for treble the amount of damaged item). If the *increase* of a jury award as a matter of law does not run afoul of the separation of powers clause, logically, a corresponding decrease cannot violate that mandate. Arbino, 880 N.E.2d at 432, 438.

The cap in §538.210 reflects a legislative policy determination, clearly within the powers of the General Assembly. It is within the province of the General Assembly to determine whether there is a rational reason for limiting the amount of noneconomic damages. The legislature has the authority to adjust the balance between those injured by medical malpractice and the general public's interest in accessible and affordable health care. Without the cap, health care providers such as University Amici would lose their

current ability to predict losses and indemnity payments. Overall losses would rise. As a result, premiums would increase dramatically, significantly compromising the University Amici's ability to support other Amici programs which benefit Missouri citizens and communities, such as education, research and providing health care to underinsured and uninsured citizens. Clearly, it was within the province of the legislature to rationally address these concerns.

Appellant characterizes the cap as a "legislative remittitur" and suggests that this Court should follow the Illinois Supreme Court and hold that the cap violates a separation of powers clause in the State constitution. Appellant's Initial Brief at 36-38; see Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997); LeBron v. Gottlieb Memorial Hosp., 930 N.E.2d 895 (Ill. 2010). However, the logic underlying the Illinois Supreme Court's analysis is not applicable in Missouri. In concluding that a cap on noneconomic damages violated the separation of powers provision of the Illinois constitution, the Illinois Supreme Court relied on the fact that "for over a century, application of [the remittitur] doctrine has been a traditional and inherent power of the judicial branch." *LeBron*, 930 N.E.2d at 905. Conversely, there was a period of time in Missouri when remittitur was abolished, and was then partially renewed legislatively through §537.068 RSMo. Compare Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. banc 1985) (abolishing remittitur in Missouri) with §537.068 RSMo (re-establishing court's power to remit a verdict under certain circumstances). Unlike Illinois, the

practice of remittitur has never been found to be a "traditional and inherent" power of the Missouri courts. Thus, the Illinois analysis is not applicable here.

Watts fails to recognize that courts in other states with a constitutional tradition more similar to Missouri's have upheld limitations on noneconomic damages against constitutional challenges based on separation of powers provisions. *See, e.g., Gourley ex rel. Gourley v. Nebraska Methodist Health System*, 663 N.W.2d 43 (Ne. 2003); *Verba v. Ghaphery*, 552 S.E.2d 406 (W.Va 2001); *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115 (Id. 2000); *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989). For example, the Supreme Court of Nebraska declared, "... the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy. We have stated repeatedly that the Legislature may change or abolish a cause of action. Thus, the ability to cap damages in a cause of action is a proper legislative function." *Gourley*, 663 N.W.2d at 77. Most recently, the Supreme Court of West Virginia explained:

... the Legislature's decision to reduce the cap has no impact on our prior analysis of this issue. As this Court concluded in *Verba*, establishing the amount of damages recoverable in a civil action is within the Legislature's authority to abrogate the common law. . . . 'if the legislature can, without violating separation of powers principles, establish statutes of limitation, establish statutes of repose, create presumptions, create new causes of action and abolish old ones, then it also can limit noneconomic damages without violating the separations of powers doctrine.'

MacDonald v. City Hospital, Inc., 715 S.E.2d 405, 415 (W.Va. 2011), quoting Verba, 552 S.E.2d at 411. Watts' separation of powers argument is without merit.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT
SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS
CONSTITUTIONAL BECAUSE THIS STATUTE DOES NOT
VIOLATE THE EQUAL PROTECTION CLAUSE OF THE
MISSOURI CONSTITUTION, ARTICLE I, SECTION 2, IN THAT
THE AMENDMENTS TO §538.210 ARE RATIONALLY RELATED
TO THE STATE'S LEGITIMATE INTEREST IN PRESERVING
ADEQUATE, AFFORDABLE HEALTH CARE FOR ALL
MISSOURIANS

**A.** 

### Adams and the Constitutionality of Limits on Noneconomic Damages

In *Adams*, this Court rejected an equal protection challenge to the limit on noneconomic damages. Because the statute did not involve denial of a fundamental right or a suspect class, this Court reviewed the statute under the rational basis test. This Court in *Adams* observed that a statute will survive rational basis review "if its classifications are rationally related to a legitimate state interest." *Id.* at 903. "Rational basis review is minimal in nature." *Id.* A statutory classification will be upheld if "any state of facts reasonably may be conceived to justify it." *Id.* (internal quotation omitted). "Under a rational basis review, a court will strike down the challenged legislation only if the

classification rests on grounds wholly irrelevant to the achievement of the state's objective." *Id.* (internal quotation omitted).

This Court recognized that the 1986 statute treated health care providers differently from other tortfeasors. However, the Court concluded that "[t]he legislature could rationally believe that the cap on noneconomic damages would work to reduce in the aggregate the amount of damage awards for medical malpractice and, thereby, reduce malpractice insurance premiums paid by health care providers." *Id.* at 904. It found that the limit on noneconomic damages was a "rational response to the legislative purpose of maintaining the integrity of health care for all Missourians." *Id.* 

### B.

# The 2005 Limit on Noneconomic Damages is Subject to a Rational Basis Standard of Review

In 2005, the General Assembly revisited many of the statutory provisions intended to promote affordable health care and preserve public health in Missouri, including the provision of §538.210 relating to the limit on noneconomic damages. The amendments to §538.210 clarify that a single noneconomic damages limit applies to the cause of action as a whole rather than independent limits applying to each "occurrence." The

amendments also eliminated the provision that permitted a separate limit to be applied to each defendant named by the malpractice plaintiff.<sup>12</sup>

None of these changes to §538.210 affects the logic relied on by this Court in *Adams* when it upheld the validity of a noneconomic damage limitation in the face of an equal protection challenge. This Court's holding was grounded in the deference owed to the judgments of the General Assembly under a rational basis standard of review. This Court properly applied this standard in *Adams* and upheld the validity of the damage limitation after concluding that the limitation was "rationally related to the general goal of preserving adequate, affordable health care for all Missourians." *Id.* at 904-5.

Even were this Court to reconsider the validity of §538.210, it still must apply rational basis review. Watts halfheartedly contends that a strict scrutiny standard should be applied – claiming that the statute violates the fundamental constitutional right to a jury trial. For the reasons set forth in Section I, that argument was properly rejected by the Court in *Adams*. *E.g.*, *Adams*, 832 S.W.2d at 905-7 (damage cap did not contravene access to open courts, right to trial by jury or due process rights).

Watts' suggestion that the damage limitation adversely affects "suspect classes" such as women, racial minorities, children and the elderly – thereby triggering a higher level of scrutiny – is equally unavailing. The damage limitation in §538.210 is facially

<sup>&</sup>lt;sup>12</sup>The legislature also made the policy decision to eliminate the provision that "increased or decreased" the limitation on an annual basis based on the Implicit Price Deflator for Personal Consumption Expenditures published by the Bureau of Economic Analysis of the Department of Commerce. *See* §538.210.4 (2004).

neutral and does not distinguish among these "classes." *See, e.g., Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10<sup>th</sup> Cir. 1996) (Kansas statute limiting noneconomic damages to \$250,000 did not single out persons with disabilities for unfavorable treatment and did not create suspect classification). A suspect classification exists either where a group of persons is legally categorized and the resulting class has historically been subject to unequal treatment or where a facially neutral law has a discriminatory motive. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). There is no suggestion of a discriminatory motive for the damage limitation. Also, this Court has previously rejected any notion that victims of medical malpractice are a suspect class. *Adams*, 832 S.W.2d at 903.

C.

# The 2005 Amendments to §538.210 Are a Reasonable Legislative Response to the Erosion of the 1986 Limitation on Noneconomic Damages

Many of the same reasonable legislative objectives acknowledged in *Adams* underlie the General Assembly's 2005 amendments to §538.210. House Bill 393, and specifically the amendments to §538.210, reflect the General Assembly's attempt to readjust the balance it intended to strike with its 1986 legislation limiting the amount of noneconomic damages. The General Assembly was reacting to a number of judicial decisions that eroded the intended effect of the 1986 statute. As discussed in the Interest of the Amici Curiae, this erosion led to unpredictability in claims analysis, substantially increased costs for health care providers, such as the University Amici, and diverted

funds that could otherwise be used by the Amici to benefit Missouri citizens and communities.

The most significant change in application of the statutory limitation occurred as a result of the 2002 decision in *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 570-71 (Mo.App. E.D. 2002). In *Scott*, the Missouri Court of Appeals, Eastern District, concluded that even if a malpractice plaintiff suffered a single indivisible injury, the language allowing a plaintiff to recover up to the \$350,000 limit "per occurrence" meant that a separate limit on noneconomic damages could be applied to each "act" of medical negligence that contributed to that injury. The Western District later reached the same conclusion in *Cook v. Newman*, 142 S.W.3d 880 (Mo.App.W.D. 2004).

The effect of *Scott* and *Cook* was to significantly undermine the 1986 limitation on noneconomic damages. For example, in *Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635 (Mo.App.E.D. 2005), the plaintiffs were allowed to submit five separate occurrences of negligence to the jury – based on five different office visits – potentially giving rise to five noneconomic damage limits as to this defendant alone. *Id.* at 652-53. This evolution in the practical application of §538.210 made it difficult, if not impossible, for the University Amici to analyze their exposure on any particular claim. The predictability originally afforded by the enactment of §538.210 in 1986 was dramatically diluted – if not lost altogether.

The 1986 limit was also undermined by interpretations that expanded the number of individuals who qualified as a separate "plaintiff" or "defendant" for purposes of

§538.210. For example, in 2001 the Missouri Court of Appeals, Western District, held a spouse was a separate "plaintiff" under §538.210.1; therefore, the spouse's award for loss of consortium was subject to its own limit on noneconomic damages independent of the limit applicable to the injured party. *Wright v. Barr*, 62 S.W.3d 509, 536-37 (Mo.App. W.D. 2001). *See also LaRose v. Washington University*, 154 S.W.3d 365, 372-73 (Mo.App. E.D. 2004) (following *Wright v. Barr*).

In *Cook v. Newman*, 142 S.W.3d 880 (Mo.App.W.D. 2004), the court followed *Scott* in holding that each "occurrence" gave rise to a separate limit, and also held that a doctor and a non-hospital health care provider – such as a university – were separate defendants subject to separate limits, even though the liability of the health care provider was entirely vicarious. *Id.* at 891-92. The *Cook* opinion effectively doubled the exposure of entities such as the University Amici – who employ doctors and other health care professionals for whom they are vicariously liable – multiplying the already exponential effect of the *Scott* decision. An inability to predict the number of occurrences that might be found by a jury thwarted efforts of the University Amici to forecast their exposure on a given claim.

The General Assembly responded to this erosion of the limit on noneconomic damages. In fact, it accepted an invitation. In discussing the number of damage limits available per defendant, the *Scott* court effectively invited a response from the General Assembly:

We further note that if . . . only one damage cap per defendant always applied in a malpractice case no matter how many separate occurrences of medical malpractice by a single defendant caused the plaintiff's injuries, the clearest and most unambiguous way for the legislature to have expressed such an intent would have been to simply leave the words "per occurrence" out of the statute entirely.

*Scott*, 70 S.W.3d at 571. In 2005, the General Assembly adopted this suggestion and eliminated the "per occurrence" language from §538.210.

### D.

# Watts and her Supporting Amici are Asking this Court to Act as a Super Legislature and Reweigh Legislative Facts

The General Assembly's changes to §538.210 are owed the same deference that this Court exhibited in *Adams*. As recently as July of 2011, this Court reaffirmed the highly deferential nature of rational basis review. In *Kansas City Premier Apartments*, *Inc. v. Missouri Real Estate Commission*, 344 S.W.3d 160 (Mo. banc 2011), this Court emphasized that rational basis review does not question "the wisdom, fairness, or logic of legislative choices" and that all that is required is that the Court find a plausible reason for the legislative choice. *Id.* at 170 (internal quotations omitted).

In the equal protection challenge, Watts invites this Court to act as a super legislature and reweigh "the wisdom, fairness, or logic" underlying the 2005 tort reform amendments. Watts asks the Court to sift through the various studies and opinions about whether, prior to 2005, medical malpractice claims were increasing or decreasing,

whether increases in the average claims payment could be explained by inflation, whether malpractice insurance premiums were "high" by historical standards, and whether any increases in those premiums might be explained by the business cycle.

However, "[a] legislative choice 'is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *United* C.O.D. v. State of Missouri, 150 S.W.3d 311, 313 (Mo. banc 2004) quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993). There need only be "a conceivably rational basis to uphold the regulatory scheme. . . . " See, e.g., Adams, 832 S.W.2d at 904 (dismissing "array of evidence" both supporting and refuting existence of "crisis" in medical malpractice premiums). A party may not prevail on a constitutional challenge merely by showing that the General Assembly was, or could have been, mistaken in its legislative findings of fact. "[T]hose challenging the legislative judgment must convince the court the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503, 512 (Mo. banc 1991) (emphasis added), quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). "If the question of the legislative judgment remains at least debatable, the issue settles on the side of validity." *Id.* at 513.

In 2005, the General Assembly reasonably concluded that the 1986 legislation needed further adjustment. The 1986 legislation was prompted by a need to address a malpractice insurance crisis in the health care industry and to balance damage awards

against malpractice-related insurance costs. In 2005, the General Assembly *reasonably* could have conceived to be true that an adjustment of the limit on noneconomic damages would better promote the availability of health care in the State. To argue, as Watts must, that the effectiveness of this adjustment is not even debatable, is disingenuous. It is also belied by the experience of the University Amici submitting this brief.

In fact, the legislative intent identified by this Court in *Adams*, "to reduce in the aggregate the amount of damage awards for medical malpractice," has come to fruition with the 2005 amendments to §538.210. As indicated in Figure 1, since the effective date of House Bill 393, indemnity payments have dropped closer to the limits experienced before *Scott*, allowing the availability of more University funds for medical research, education, and the provision of health care to patients who are unable to pay for those services.

### E.

# Invalidating the Limit on Noneconomic Damages Would Be a Stark and Unwarranted Departure from this Court's Prior Equal Protection Jurisprudence

To invalidate this legislation on equal protection grounds would run counter to previous opinions of this Court upholding the validity of legislative efforts to respond to "public concern over the increased cost of health care and the continued integrity of that system of essential services." *Mahoney*, 807 S.W.2d at 507. *E.g.*, *Harrell v. Total Health Care*, *Inc.*, 781 S.W.2d 58, 61 (Mo. banc 1989) (upholding validity of a statute exempting health services corporations from malpractice claims); *Mahoney*, 807 S.W.2d

at 513 (upholding requirement that plaintiff file health care affidavit); *Adams*, 832 S.W.2d at 904-5 (upholding noneconomic damages limitation); *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996) (upholding tolling statute that excepted medical malpractice claims). In all of these opinions, this Court recognized the legislature's interest in responding to concerns about the cost and availability of health care services.

To invalidate the 2005 amendments on equal protection grounds would effect a sea change in this Court's equal protection jurisprudence generally. Quite apart from malpractice reform, the Court has consistently declined to question the policy judgments of the legislature absent violation of a fundamental right or discrimination against a suspect class. See, e.g., Winston v. Reorganized School Dist. R-2, 636 S.W.2d 324, 328 (Mo. banc 1982) (deferring to legislature regarding appropriate balance between protection of governmental funds and recovery by injured claimants); Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 829-30 (Mo. banc 1991) (deferring to legislative decision regarding scope of statute of repose); Fust v. Attorney General for the State of Missouri, 947 S.W.2d 424 (Mo. banc 1997) (upholding statute requiring that 50% of any punitive damages award be deemed payable to State of Missouri); Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771 (Mo. banc 2003) (deferring to legislative decision to exclude certain heirs from recovery of death benefits); Snodgras v. Martin & Bayley, Inc., 204 S.W.3d 638 (Mo. banc 2006) (deferring to legislature's decision to allow claims against licensed sellers by the drink and prohibit claims against

sellers of packaged liquor); *Foster v. St. Louis County*, 239 S.W.3d 599 (Mo. banc 2007) (legislature had conceivable rational basis for granting immunity to landowners who permit free recreational access to their property).

Invalidating the limit on noneconomic damages would also sever the historical link between the Equal Protection Clause of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. In the past, this Court has consistently interpreted the Missouri Equal Protection Clause to be coextensive with that of the Fourteenth Amendment. *Bernat v. State of Missouri*, 194 S.W.3d 863, 867 (Mo. banc 2006), *citing Blaske*, 821 S.W.2d at 829. Numerous federal courts have upheld similar limitations on damages against challenges under the Equal Protection Clause of the Fourteenth Amendment. *E.g., Boyd v. Bulala*, 877 F.2d 1191, 1196-97 (4<sup>th</sup> Cir. 1989) (limitation on damages reasonably related to valid legislative purpose of maintaining adequate health care services); *see also Lucas v. United States*, 807 F.2d 414, 422 (5<sup>th</sup> Cir. 1986); *Smith v. Botsford General Hospital*, 419 F.3d 513, 520 (6<sup>th</sup> Cir. 2005); *Hoffman v. United States*, 767 F.2d 1431, 1437 (9<sup>th</sup> Cir. 1985).

The 2005 limitation on noneconomic damages in medical malpractice cases does not infringe on any fundamental right or discriminate against any suspect class. It is rationally related to the goal of ensuring affordable health care for all Missourians. It aids the University Amici in continuing their missions to improve health care for the citizens of this State and to educate future professionals to practice and advance knowledge in medicine and the sciences relevant to medicine. These interests of the

University Amici are undoubtedly among the factors that could conceivably have been considered by the General Assembly in amending §538.210. The University Amici respectfully submit that consistent with its prior opinions, this Court should not find an equal protection violation in this case.

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT §538.210,
AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL
BECAUSE THIS PROVISION DOES NOT VIOLATE ARTICLE III,
SECTION 40 OF THE MISSOURI CONSTITUTION IN THAT IT IS
NOT A SPECIAL LAW AND IT DOES NOT CREATE AN
ARBITRARY CLASSIFICATION

Watts also argues that §538.210 violates the prohibition against special legislation in Article III, Section 40 of the Missouri Constitution. Article III, Section 40 states in pertinent part:

The general assembly shall not pass any local or special law: . . .

- (6) for limitation of civil actions; . . .
  - \* \* \*
- (30) where a general law can be made applicable, . . .

Mo. Const. art. III, § 40.

The burden is upon the party challenging a statute as a special law to show that the law has an arbitrary classification that lacks a rational relationship to a legislative purpose. *Jackson County v. State*, 207 S.W.3d 608, 611 (Mo. banc 2006). A "special

law" is a "[a] law which includes less than all who are similarly situated . . . but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." *Ross v. Kansas City General Hospital and Medical Center*, 608 S.W.2d 397, 400 (Mo. banc 1980).

Section 538.210 is not a "special law" because it applies to all persons who bring "any action against a health care provider." There are no members of the stated class omitted "whose relationship to the subject-matter cannot by reason be distinguished from that of those included." *Blaske v. Smith & Entzeroth*, 821 S.W.2d 822, 831 (Mo. banc 1991), *quoting State v. County Court of Greene County*, 667 S.W.2d 409, 412 (Mo. banc 1984). The statute applies equally to all persons who bring a claim against a health care provider; it does not distinguish among those who bring such claims or those health care providers against whom a claim is brought. <sup>13</sup>

The statute does create a distinction between health care providers and other potential tortfeasors. That distinction, however, has long been upheld by this Court. *E.g. Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. banc 1968) (upholding two-year statute of limitations for medical malpractice actions as "reasonable, and not discriminatory");

<sup>&</sup>lt;sup>13</sup> Watts attempts to find classifications in the statute where none exist. Appellant suggests that the statute distinguishes among health care providers that treat the young, provide medical services to women, racial and ethnic minorities, children, the elderly and economically disadvantaged, by shielding them from a higher percentage of tort judgments. Appellant's Brief at 67-69. Section 538.210 simply does not draw any of these distinctions.

Batek v. Curators of University of Missouri, 920 S.W.2d 895, 899 (Mo. banc 1996) (upholding tolling statute that excluded plaintiffs who assert actions against health care providers). Indeed, as long as the distinctions are reasonable, this Court has upheld statutes that distinguish among claims against health care providers. E.g. Ross, 608 S.W.2d at 400 (upholding distinction between accrual of malpractice claim based on foreign object left in body and all other malpractice claims); Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 63 (Mo. banc 1989) (upholding statute that exempted health services corporations from liability even though statute did not apply to hospitals).

The General Assembly "possesses the power to select and classify objects of legislation, and just as undoubtedly may exercise a wide discretion in the exertion of that power." *Hawkins v. Smith*, 147 S.W. 1042, 1044 (Mo. 1912) (internal quotation omitted). "It is 'sufficient to satisfy the demand of the Constitution if a classification is practical and not palpably arbitrary." *Id. quoting Louisville & Nashville R.R. v. Melton*, 218 U.S. 36, 55 (1910). The wisdom or necessity of legislative classification is not for the courts; it is sufficient if any difference in a situation or condition exists which affords a reasonable ground for the classification. *Arnold v. Hanna*, 290 S.W. 416, 422 (Mo. banc 1926), *aff'd*, 276 U.S. 591 (1928). Where, as here, the statute does not involve either a fundamental right or a suspect class, "the same principles and considerations that are involved in determining whether the statute violates equal protection" are applicable. *Blaske*, 821 S.W.2d at 832.

As set forth in Section III, the General Assembly could reasonably have concluded that it was necessary to amend §538.210, both in response to cases like *Scott* and *Cook* and to improve and promote the availability and affordability of health care in Missouri. There were reasonable grounds for amending the statute as evidenced by the large increase in malpractice reserves and insurance premiums for entities such as the University Amici – the effect of which was to divert funds from other important programs. Health care providers generally, and the University Amici in particular, provide great benefits to Missouri communities. The University Amici provide indigent health care, scholarships to medical students in need, and research programs designed to find cures to, or vaccines for, diseases affecting Missouri citizens. The funding for those activities is directly affected by the costs of medical malpractice liability. The current national debate on health care is certainly evidence that there is a health care crisis in this country that justifies treating health care providers differently from other possible tortfeasors. As in *Adams*, "the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." 832 S.W.2d at 904.

Watts states that Missouri's sister states have invalidated caps on special legislation grounds, yet fails to note that other states have also upheld limitations on noneconomic damages that were challenged on "special legislation" grounds.

Appellant's Brief at 68, fn. 29. See, e.g., Gourley ex rel. Gourley v. Nebraska Methodist Health System, 663 N.W. 2d 43, 66 (Neb. 2003); Etheridge v. Medical Center Hospitals,

376 S.E.2d 525, 533 (Va. 1989) (finding "limitation applies to *all* health care providers and to *all* medical malpractice plaintiffs") (emphasis in original); *Kirkland v. Blaine County Medical Center*, 4 P.3d 1115, 1120 (Idaho 2000). As explained by the Idaho Supreme Court, "Because we find the state had a legitimate interest in protecting the availability of liability insurance for Idaho citizens, and I.C. § 6-1603 is neither an arbitrary, capricious, nor unreasonable method for addressing this legitimate societal concern, we find I.C. § 6-1603 does not violate the constitutional prohibition against special legislation." *Kirkland*, 4 P.3d at 1121. *See also Gourley*, 663 N.W.2d at 69 ("The class is based upon reasons of public policy and substantial differences of situation or circumstances that suggested the justice or expediency of diverse legislation").

Watts has not met her burden. The noneconomic damages limitation in §538.210 does not create an arbitrary classification; it has a rational relationship to a legislative purpose. Consequently, this Court should reject Watts' assertion that §538.210 violates the prohibition against "special laws" in Article III, Section 40 of the Missouri Constitution.

# **CONCLUSION**

This Court correctly concluded in *Adams* that a limitation on noneconomic damages in medical malpractice cases does not violate the Missouri Constitution. As a matter of constitutional law, this Court must defer to the judgment of the Missouri General Assembly. As with any matter of intense public interest, there are strong and often conflicting opinions about what constitutes the appropriate public policy approach

to medical malpractice liability. The consequent debate may well lead to further legislative adjustments in the future. However, as in *Adams*, there can be no legitimate dispute that there is a rational basis for the current approach taken by the General Assembly. The limitation on noneconomic damages has a very real impact on the costs of medical malpractice liability. As set out in the Interest of the Amici Curiae, it directly affects the ability of medical institutions, such as the University Amici, to carry out their health care missions.

The University Amici respectfully submit that the General Assembly was well within its constitutional authority in enacting the 2005 limit on noneconomic damages. They strongly urge this Court to affirm that authority and uphold the trial court's finding that the limit is constitutional. Any other conclusion not only would be inconsistent with prior decisions of this Court, but would have a serious and detrimental impact on the provision of health care in Missouri.

## Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that:

- 1. Brief of the Amici Curiae contains the information required by Rule 55.03;
- 2. Brief of the Amici Curiae complies with the limitations contained in Rule 84.06(b); and
- 3. Brief of the Amici Curiae, excluding the cover page, certificate of service, this certificiate and signature blocks, contains 14,120 words, as determined by the word count tool contained in Microsoft Word 2007.

January 9, 2012 /s/ Susan E. Bindler

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 9th day of January 2012, the foregoing brief was filed electronically with the Clerk of the Court to be served by operation of the Missouri eFiling System upon the following counsel:

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